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In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, and JAMES EVERETT SMITH,

Petitioners,

v.

TERI LEWIS and THOMAS LEWIS, Personal Representatives of the Estate of PHILIP LEWIS,

Respondents.

On Petition For Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

[redacted]

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALASKA, ARIZONA, TERRITORY OF GUAM, HAWAII, IDAHO, IOWA, MONTANA, NEW YORK, NORTH DAKOTA, OHIO, OREGON, SOUTH DAKOTA, WISCONSIN AND WYOMING IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION OF STATES FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, the States of California, Alaska, Arizona, Territory of Guam, Hawaii, Idaho, Iowa, Montana, New York, North Dakota, Ohio, South Dakota and Wyoming hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for petitioner has been obtained. The consent of the attorneys for respondent was requested but refused or withheld.

The interest of the *Amici* arises from their responsibility for law enforcement in general and for their particular responsibility for ensuring the safety of the highways. *Amici* respectfully suggest that it will be useful to the Court to consider their views which focus on the particular concern for patrolling state highways.

Respectfully submitted,

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QUESTIONS PRESENTED

I. Is the standard of conduct necessary to establish a violation of substantive due process under the Fourteenth Amendment in a police vehicular pursuit case brought pursuant to 42 U.S.C § 1983, conduct that "shocks the conscience" or is it conduct "deliberately indifferent" to or "in reckless disregard" of the rights of a person injured in the course of the pursuit?

II. Is the law governing police pursuit cases "clearly established" so that officers engaged in such pursuits must be denied the protection of qualified good faith immunity from liability to a person injured in the course of the pursuit?

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICI STATES

Amici States are responsible for patrolling the highways of this Nation and enforcing the laws that pertain to motorists and the safe, lawful operation of motor vehicles. The States also have a general interest in crime prevention, effective law enforcement, and public safety. If allowed to stand, the decision of the Ninth Circuit Court of Appeals in the underlying case of *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), will cripple apprehension of those who violate the law and will have an extremely negative impact on law enforcement.

In *Lewis*, the Ninth Circuit applied "deliberate indifference" or "reckless disregard" as the standard of conduct necessary to establish a violation of the substantive due process rights of a person injured as a result of a police vehicular pursuit. The Court further held that the defendant police officer was not entitled to the protection of qualified immunity from liability because the law governing police pursuit cases was "clearly established" at the time of the 1990 incident giving rise to the action.

The standard adopted by the Ninth Circuit is clearly contrary to the ruling of this Court in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) that conduct which gives rise to liability under the Civil Rights Act, 42 U.S.C. § 1983 must be conduct which "shocks the conscience." Moreover the conclusion of the Court that the officer was not entitled to good faith immunity because the law governing his conduct was "well established" is contrary to years of precedent and stands the concept of "well established" on its head.

The Amici States clearly have an interest in having this Court grant the petition of the County and reverse the Ninth Circuit. If this Court fails to assume jurisdiction and the *Lewis* decision stands, law enforcement entities will be forced to decide whether or not they can *afford* to continue to engage in high speed vehicular pursuits. If *Lewis* stands, every pursuit which results in any injury, regardless of the circumstances, will lead to the filing of a civil rights action, exposing the entity to the cost of defending the action. Trial courts will refuse to grant summary judgment in all but the rarest of cases; they will be precluded from dismissing cases on grounds of qualified immunity. Law enforcement entities will have to choose between settling the action and facing the risk of an award of general damages, special damages, costs *and* attorneys fees as well as the risk of an award of punitive damages against their employee officers. In short, entities and the public can expect a very substantial increase in the cost of doing business. State highway patrols may have to abandon high speed pursuits in all but the most compelling of circumstances. As it becomes public knowledge that high speed pursuits are very narrowly proscribed, drunk drivers, serious felons, and those who simply want to avoid the high cost of a speeding ticket, will flee leaving police officers without effective means of enforcing the law.

Amici States have an acute interest in effective law enforcement and therefore a significant interest in this case. This interest can only be protected by granting the requested petition for certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals for the Ninth Circuit erred in concluding that an officer engaged in a high speed vehicular pursuit can be held liable under the Civil Rights Act, 42 U.S.C. § 1983 if that officer's conduct was "deliberately indifferent to or in reckless disregard of" the substantive due process rights of a person injured as a result of the pursuit. This Court has established that an additional element is required; the conduct must be conduct which "shocks the conscience." The standard adopted by the Ninth Circuit is inconsistent with the precedent set by this Court and with the decisions of the majority of the circuits which have addressed the issue.

The public policy impact of adopting the standard proposed by the Ninth Circuit is obvious. The standard of "deliberate indifference to or reckless disregard of" the safety of an injured person will essentially federalize state tort claims and open the proverbial floodgates of litigation, effects this Court has taken great pains to avoid.

The Ninth Circuit also erred in concluding that qualified immunity does not protect the individual officer from liability in cases such as *Lewis*. The law governing vehicular pursuits was not, and currently is not, clearly established. This is evidenced by the manifest disagreement among the various circuits concerning the standard of conduct which will give rise to liability. A police officer is entitled to the protection of qualified immunity while the standard which governs his conduct is uncertain. The Ninth Circuit erred in denying immunity.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

REVIEW IS NECESSARY BECAUSE THE OPINION OF THE NINTH CIRCUIT IS INCONSISTENT WITH THE OPINION OF THIS COURT AND THOSE OF THE FIRST, THIRD, FOURTH AND FIFTH CIRCUITS CONCERNING THE STANDARD OF CONDUCT NECESSARY TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS IN THE CONTEXT OF A VEHICULAR POLICE PURSUIT.

The Ninth Circuit erred in concluding that in the context of a high speed vehicular police pursuit case that "deliberate indifference to or reckless disregard" of the rights of an injured party is sufficient to establish liability under Section 1983 of the Civil Rights Act, 42 U.S.C. § 1983. Its decision is inconsistent with the decision of this Court in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) and with the majority of circuits which have addressed the issue. To establish liability in this context, the actions of the police officer must constitute conduct which "shocks the conscience."

In 1992, this Court reviewed the issue of substantive due process in the landmark case of *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). In *Collins*, the wife of a city sanitation worker asphyxiated during the course of his duties claimed that her husband's substantive due process rights were violated by the city's alleged custom and policy of deliberate indifference to the safety of its employees. After noting its concern with any expansion of the concept of substantive due process, this Court added as a necessary element to plaintiff's claim, the

requirement that the "deliberate indifference of the City to Collins' safety be arbitrary government action that 'shock[s] the conscience' of federal judges." *Id.*, at 126. The Court reiterated this requirement when it ultimately concluded that the conduct of the city did not violate substantive due process because the city's conduct could not be characterized as conscience shocking. *Id.*, at 128. The Court viewed plaintiff's claim as a typical state tort claim. It reiterated its well established rejection of the notion that the Due Process Clause should be interpreted to create federal duties of care analogous to tort law. *Id.*

The *Lewis* case involves a vehicular pursuit by Sacramento County Sheriff Officer Smith of two teenagers on a motorcycle who refused to stop at the request of another officer, accelerated away at a high rate of speed, and ran a stop light. According to the Ninth Circuit, the speed of the chase averaged 60 m.p.h. and proceeded through four stop lights. When the motorcycle driver went over the crest of a hill and then attempted to negotiate a sharp turn, he lost control of the motorcycle skidding to a stop. Officer Smith crested the hill, lost control of his vehicle and was unable to stop. Neither of the teenagers was wearing a helmet. The motorcycle passenger died as a result of his injuries. His parents sued for violations of his civil rights.

After conceding that its prior decisions holding that gross negligence is the standard of conduct necessary to establish a substantive due process violation were no longer controlling, the Ninth Circuit stated that it was, however, "clear that deliberate indifference is always sufficient." *Lewis*, 98 F.3d at 440. The Court concluded that "the appropriate degree of fault to be applied to high-

speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security." *Lewis*, 98 F.3d at 441.

For reasons which are unclear, the Ninth Circuit totally ignored the *Collins* decision in deciding *Lewis*. The Court cited *Collins* only once and then only for the principle that the Due Process Clause does not supplant traditional tort law. *Lewis*, 98 F.3d at 439. The court never addressed the issue of the additional element enunciated in the *Collins* case that the governmental misconduct be conduct which "shocks the conscience." Instead, the Court discussed *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), as though *Canton* were the most recent pronouncement of this Court on the standard of conduct necessary to constitute a violation of substantive due process. It did not discuss, distinguish, or criticize *Collins*; *Collins* was simply ignored.

Since *Collins*, the First and Third Circuits have addressed the issue of the standard of conduct in police pursuit cases and have correctly interpreted *Collins* to require a showing of conduct which "shocks the conscience" as a prerequisite to stating a claim for violation of substantive due process. See *Evans v. Avery*, 100 F.3d 1033, 1038-39 (1st Cir. 1996) and *Fagan v. City of Vineland*, 22 F.3d 1296, 1306-1307 (3d Cir. 1994) (en banc).

Two other circuits, the Fourth and Fifth, applied the conscience shocking standard to police pursuits prior to the issuance of *Collins*. See *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 723 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) and *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986).

However there are several other police pursuit cases in which the courts have adopted a lesser or different standard. In *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987), the Eighth Circuit held that gross negligence or outrageous conduct would suffice. In the high speed case of *Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992), the Tenth Circuit adopted a standard of reckless disregard of plaintiff's rights.

Amici States submit that the "shocks the conscience" standard is the standard dictated by this Court, and that it controls this case. In its discussion of various decisions addressing the question of standard of conduct the Ninth Circuit referred to the different standards as mere labels. The court states as follows:

> "Five circuits have addressed § 1983 liability in the context of high-speed pursuits. These circuits have applied *various labels* to the standard of conduct that may lead to liability." *Lewis v. County of Sacramento*, at 439. (Italics added.)
>
> "Footnote 5. No federal circuit court has required intentional government misconduct as a basis for a § 1983 due process violation. Likewise, no circuit has found that negligent conduct can form the basis of a § 1983 due process violation. But the *labels* the courts have applied to official conduct constituting a § 1983 due process violation range across a spectrum that lies between ordinary negligence and intentional misconduct." *Lewis, Id.* (Italics added)

The Ninth Circuit then proceeded to cite the cases applying different standards as though the standards were merely different labels for the same concept.

If the issue were merely one of labels as the Ninth Circuit suggests, one would expect the same result in cases involving very similar conduct. This is not the case. In cases in which the "shocks the conscience" standard was applied, the courts found no due process violation; in cases in which the courts applied the "deliberate indifference" or "reckless disregard" standard, a claim was found to exist.

For instance, the facts in the *Lewis* case and the *Fagan* case are quite similar. Both cases involved pursuit of teenagers. Both pursuits were initiated for relatively minor transgressions. Both pursuits reached speeds in excess of 60 miles per hour. In *Lewis*, the Ninth Circuit concluded that a standard of deliberate indifference or reckless disregard applied and that therefore an issue of fact existed and summary judgment should not have been granted by the trial court. *Lewis v. Sacramento County*, 98 F.3d at 444.

By contrast, in *Fagan*, the Third Circuit applied the "shocks the conscience" standard and concluded that a genuine issue of fact was not present and summary judgment was appropriate. *Fagan v. City of Vineland*, 22 F.3d at 1308-1309.

Another example in a context other than the police pursuit scenario is presented by a comparison of *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) and *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995). In *Grubbs*, a nurse employed by the State of Oregon at a medium security institution for young male offenders was raped and terrorized by one of the inmates. In her action against the State, she alleged that the government actors had violated her

rights by intentionally placing her in a position of known danger, that is, in unguarded proximity to a violent sex offender. The Ninth Circuit concluded that the plaintiff had stated facts demonstrating official deliberate indifference to her safety and that she had therefore stated a claim for violation of her substantive due process rights.

The facts in the case of *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995) are quite similar. *Uhlrig* involved a claim by the estate of an activity specialist employed at a state mental hospital, that the substantive due process rights of the therapist were violated when she was murdered by a violent patient. The State had eliminated a special unit for the criminally insane and as a result the patient was placed in the general population. Prior to murdering the therapist, he had raped and assaulted another patient. The Tenth Circuit explained that under *Collins*, plaintiff must make a showing of government conduct which shocks the conscience. The Court found none and affirmed summary judgment in favor of the hospital defendants. *Uhlrig v. Harder*, 64 F.3d at 573-576.

Clearly the standards applied by the courts reflect more than mere differences in labeling. The standard applied dictates the outcome.

Amici States submit that not only is the "shocks the conscience" standard the rule of this Court, but it is the better rule because it strikes the appropriate balance between competing concerns. The standard is sufficient to protect individuals from government abuse and yet allow peace officers to pursue those who violate the law.

The standard followed by the Ninth Circuit cripples law enforcement by turning unintentional conduct into

civil rights violations. This Court has taken great pains to avoid such result and has repeatedly cautioned against making the Fourteenth Amendment a font of tort law. *Paul v. Davis*, 424 U.S. 693, 701 (1976). The reluctance of this Court to expand the scope of substantive due process of the Fourteenth Amendment is that guideposts for responsible decision making in this unchartered area are scarce and open-ended. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985). Thus, the Court has followed a policy of judicial self-restraint and exercised the utmost care when requested to break new ground in this area. *Id.* To this end, the Court has previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. *Baker v. McCollan*, 443 U.S. 137, 146 (1979). The decision of the Ninth Circuit in *Lewis* does precisely that and should not be permitted to stand.

The confusion generated by the decision of the Ninth Circuit in the case at bar must be eliminated. Amici States respectfully request that the petition be granted.

II.

REVIEW IS WARRANTED TO INSURE THAT PEACE OFFICERS ARE PROTECTED FROM LIABILITY BY THE DOCTRINE OF QUALIFIED IMMUNITY WHEN THE STANDARD GOVERNING THEIR CONDUCT IS NOT CLEARLY ESTABLISHED.

For purposes of qualified immunity under 42 U.S.C. § 1983, the threshold question is whether the conduct complained of violated law clearly established at the time of the incident. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Review of this issue must be conducted in light of all relevant precedent. *Elder v. Holloway*, 510 U.S. 510 (1994).

As articulated by this Court in *Davis v. Scherer*, 468 U.S. 183 (1984), the necessity for the "clear establishment" of the law is of vital importance for protecting public officials, in that:

> "[t]he qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated . . . "
>
> "Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them . . . In these circumstances, officials should not err always on the side of caution.

Id., at 195-196."

In order for a law to be clearly established for purposes of qualified immunity, it must have earlier been developed in such a concrete and factually defined context to make it obvious to any reasonable government actor that what he is doing violates federal law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The various circuits have provided additional guidance as to when law is "clearly established." For example, if case law in factual terms has not staked out a bright line, qualified immunity almost always protects the defendant. *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

The pre-existing law must not only dictate, but truly compel – not merely suggest or allow or raise a question about – the conclusion for every like-situated government agent. *Lassiter v. Alabama A & M University, Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994). Another court has noted that where only two other circuits had considered cases on point, and a split existed between them, the relevant case law was still developing and the law had not been "clearly established." *Donovan v. City of Milwaukee*, 17 F.3d 944 (7th Cir. 1994).

Even if a governmental defendant violates another's constitutional rights, the qualified immunity protects the defendant so long as the conduct of the defendant was not unreasonable. *Davis v. Scherer*, 468 U.S. 183, 190 (1984). The test for reasonable conduct is whether the officer involved would have believed the action in question to be lawful, in light of clearly established law and the information possessed by the officer. *Hunter v. Bryant*, 503 U.S. 224, 227 (1991). In sum, the qualified immunity

defense provides protection to all but the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335 (1986).

The Ninth Circuit erred in finding the law on high speed pursuits is clearly established. The various circuit courts of appeal are clearly divided on the issue of the legal standard necessary to violate the substantive due process. The First [*Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996)], Third [*Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994)], and Fourth [*Temkin v. Frederick County Comm'rs*, 945 F.2d 716 (4th Cir.1991)] have held the standard to be conduct which "shocks the conscience." While the Tenth [*Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992)] and Eighth [*Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989)] have adopted lesser standards such as "deliberate indifference" or "gross negligence."

This conflict clearly indicates that the law is still developing. These cases do not serve as a bright-line to police officers patrolling the highways, nor can it be said that the law is so concrete that any reasonable officer would understand that pursuing a fleeing suspect at high speeds will violate the motoring public's civil rights. Likewise it cannot be said that the state of the law is such that the law "compels" the same conclusion for all like-situated reasonable officers.

Amici States respectfully submit that a peace officer should be immune from liability under the Civil Rights Act for injuries which occur in the course of a high speed chase until the courts have agreed on the standard of conduct, have established the factors which should be

considered in evaluating the conduct of the officer, and have provided some guidance as to the factual scenarios giving rise to liability.

Amici States request that this Court grant the petition for certiorari and reverse the Ninth Circuit's holding that qualified immunity does not protect peace officers engaged in high speed pursuits and that the Court take the opportunity to provide the lower courts with some guidance in application of the immunity in the context of these cases.

CONCLUSION

Based on the foregoing, Amici States respectfully request that the petition for writ of certiorari be granted.

DATED: March 20, 1997

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